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Vasanta a/l Amarasekera v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-41(Ors)-4–07 OF 2020
COLLIN SEQUERAH J
23 FEBRUARY 2022

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Criminal Procedure — Disclosure of information — Statement of witness — Application for production of witness statement made under s 112 of the Criminal Procedure Code — Whether statement of witness offered to defence by prosecution at close of prosecution case could be given to defence for purposes of deciding whether to call such offered witness during defence case — Whether appellant fulfilled requirements under s 51 of the Criminal Procedure Code — Whether witness's statement necessary and desirable — Whether there was lacuna in law regarding disclosure of prosecution's unused documents — Whether s 5 of the Criminal Procedure Code applicable — Criminal Procedure Code ss 5, 51, 112 & 113(1)

D

E

Evidence — Statement — Statement made under s 112 of the Criminal Procedure Code — Whether statement privileged — Whether statement admissible under s 32 of the Evidence Act 1950 — Evidence Act 1950 s 32

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The appellant was charged under s 467 of the Penal Code for the offence of forging a will belonging to one Adamberage Ananda Rex De Alwis ('the deceased'). At the close of the prosecution case, the prosecution had offered seven witnesses to the defence including one Maurice De Alwis ('Maurice'), the executor of the deceased's will. The prosecution had allowed the request by the appellant's lawyer to interview Maurice but the appellant's request for Maurice's statement under s 112 of the Criminal Procedure Code ('the CPC') ('Maurice's 112 statement') was rejected by the prosecution. The appellant then filed an application at the magistrate's court for the prosecution to provide Maurice's 112 statement, but the application was dismissed by the magistrate, hence, the present appeal. The issues arose in this appeal were: (a) whether the statement of a witness who was offered to the defence by the prosecution at the close of the prosecution case could be handed to the defence for the purposes of deciding whether to call such offered witness during the defence case; and (b) whether the appellant had fulfilled the twin requirements stipulated in s 51 of the CPC that the police statement of Maurice was both necessary and desirable. The appellant in the present case relied on the Court of Appeal's decision in *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46 ('Siti Aisyah') whereas the respondent relied on the High Court's decision in *Husdi v Public*

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Prosecutor [1979] 2 MLJ 304 and the Federal Court's decision in *Husdi v Public Prosecutor* [1980] 2 MLJ 80.

Held, allowing the appeal:

(1) The English common law had departed from the inflexible rule that the statements were not to be supplied and there was a noticeable shift towards justice and fairness and the 'equality of arms' notion. As far as the English common law was concerned and its capability of importing it here by virtues of s 5 of the CPC, it was apparent from *Siti Aisyah* that there was no conflict or inconsistency with the CPC in the admission of police statements of witnesses because what was prohibited under s 113(1) was such statement being used in evidence and not in cases where such statement was only disclosed to the defence. To that extent, a lacuna existed in that there was no explicit provision in our statutes that cover the law in respect of disclosure of such documents which comprised the prosecution unused documents as opposed to such documents being sought for the purposes of introducing it in evidence, save where otherwise provided (see paras 68–70).

(2) The facts of the case as described by the counsel for the appellant showed that the evidence of Maurice would certainly be highly relevant to a fact in issue ie bearing on the question as to whether the appellant forged the will. Considering Maurice's advanced age, he would not likely be able to recollect most if not all his police statement, as such, interviewing him might prove to be futile and fruitless exercise. The disclosure of Maurice's 112 statement to the appellant would also assist the defence in the preparation of their case and prevent surprises and possible impeachment of Maurice. The court therefore found that the appellant had fulfilled the twin requirements in s 51 of the CPC that the statements were both necessary and desirable. The prosecution should, therefore, disclose any unused material which may benefit the defence as provided for under the English common law and such common law was applicable in the present case by virtues of s 5 of the CPC because there was a lacuna and there was no inconsistency with the CPC (see paras 91–95).

(3) The real risk of witness tampering did not arise because if Maurice was ever called, he would be a defence witness. The disclosure of Maurice's 112 statement might also result in the defence not calling him as a witness if his statement would not assist them and so resulted in saving of much judicial time. Further, the statements could not be considered as privileged documents as was decided in *Siti Aisyah* where the court held that the position taken by the High Court in *Husdi v Public Prosecutor* ought no longer to be followed because the legislature had seen fit to classify certain documents in the Evidence Act 1950 ('the EA') as privileged. Further, s 32 of the EA provided that in certain categories of

cases such as when a person was dead, could not be found, became incapable of giving evidence or whose attendance could not be procured without delay or expense, police statements under s 112 of the CPC were admissible where their relevancy in certain circumstances could be shown. The learned magistrate had, therefore, erred in refusing the appellant's application (see paras 50, 53 & 97–100).

(4) The decision of the court herein was made on very restricted, limited and confined facts peculiar to this case as stated above. This decision did not decide that as a general rule, witness statements of witnesses offered to the defence at the close of the prosecution case, must be supplied to the defence. The right of the defence to automatic disclosure of witness statements or upon request, where such witnesses were offered to the defence at the close of the prosecution case, must await legislative intervention (see paras 104–107).

[Bahasa Malaysia summary

Perayu didakwa di bawah s 467 Kanun Keseksaan atas kesalahan memalsukan wasiat kepunyaan seorang Adamberage Ananda Rex De Alwis ('si mati'). Pada akhir kes pendakwaan, pihak pendakwaan telah menawarkan tujuh saksi kepada pihak pembelaan termasuk seorang Maurice De Alwis ('Maurice'), pelaksana wasiat si mati. Pihak pendakwaan telah membenarkan permintaan peguam perayu untuk menemu bual Maurice tetapi permintaan perayu untuk pernyataan Maurice di bawah s 112 Kanun Tatacara Jenayah ('KTJ') ('pernyataan 112 Maurice') telah ditolak oleh pihak pendakwaan. Perayu kemudian memfailkan permohonan di mahkamah majistret untuk pihak pendakwaan memberikan pernyataan 112 Maurice, tetapi permohonan tersebut ditolak oleh majistret, justeru, rayuan semasa. Isu-isu yang timbul dalam rayuan ini ialah: (a) sama ada pernyataan oleh saksi yang ditawarkan kepada pihak pembelaan oleh pihak pendakwaan pada akhir kes pendakwaan boleh diserahkan kepada pihak pembelaan bagi tujuan memutuskan sama ada untuk memanggil saksi yang ditawarkan tersebut semasa kes pembelaan; dan (b) sama ada perayu telah memenuhi dua syarat yang ditetapkan dalam s 51 KTJ bahawa pernyataan polis Maurice adalah perlu dan wajar. Perayu dalam kes ini bergantung kepada keputusan Mahkamah Rayuan dalam kes *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46 ('Siti Aisyah') manakala responden bergantung kepada keputusan Mahkamah Tinggi dalam kes *Husdi v Public Prosecutor* [1979] 2 MLJ 304 dan keputusan Mahkamah Persekutuan dalam kes *Husdi v Public Prosecutor* [1980] 2 MLJ 80.

Diputuskan, membenarkan rayuan:

(1) Undang-undang umum Inggeris telah beralih dari peraturan yang tidak fleksibel bahawa pernyataan tersebut tidak boleh dibekalkan dan terdapat peralihan yang ketara ke arah keadilan dan kesaksamaan dan tanggapan 'equality of arms'. Berkaitan dengan undang-undang umum

Inggeris dan keterpakaiannya di sini berdasarkan s 5 KTJ, adalah jelas daripada kes *Siti Aisyah* bahawa tidak ada konflik atau percanggahan dengan KTJ dalam penerimaan pernyataan polis saksi kerana apa yang dilarang di bawah s 113(1) ialah pernyataan sedemikian digunakan sebagai keterangan dan bukan dalam kes di mana pernyataan sedemikian hanya didedahkan kepada pihak pembelaan. Setakat itu, lakuna wujud kerana tiada peruntukan yang jelas dalam statut yang meliputi undang-undang berkenaan dengan pendedahan dokumen sedemikian yang terdiri daripada dokumen pihak pendakwaan yang tidak digunakan berbanding dengan dokumen-dokumen yang dimohon untuk tujuan pengemukaannnya sebagai keterangan, kecuali jika dinyatakan sebaliknya (lihat perenggan 68–70).

(2) Fakta kes seperti yang diterangkan oleh peguam perayu menunjukkan bahawa keterangan Maurice pastinya akan sangat relevan dengan fakta dalam isu iaitu berkaitan dengan persoalan sama ada perayu memalsukan wasiat. Memandangkan usia Maurice yang sudah lanjut, dia mungkin tidak akan dapat mengingati kebanyakan atau semua pernyataannya kepada polis, oleh itu, menemu bualnya mungkin terbukti menjadi sesuatu yang sia-sia dan tidak membuahkan hasil. Pendedahan pernyataan 112 Maurice kepada perayu juga akan membantu pihak pembelaan dalam penyediaan kes mereka dan mengelakkan kejutan dan kemungkinan pencabaran ke atas Maurice. Oleh itu, mahkamah mendapati perayu telah memenuhi dua syarat dalam s 51 KTJ bahawa pernyataan tersebut perlu dan wajar. Oleh itu, pihak pendakwaan hendaklah mendedahkan apa-apa bahan yang tidak digunakan yang boleh memberi manfaat kepada pembelaan seperti yang diperuntukkan di bawah undang-undang umum Inggeris dan undang-undang umum tersebut terpakai dalam kes ini berdasarkan s 5 KTJ kerana terdapat lakuna dan tiada percanggahan dengan KTJ (lihat perenggan 91–95).

(3) Risiko sebenar gangguan ke atas saksi tidak timbul kerana jika Maurice dipanggil, dia akan menjadi saksi pembelaan. Pendedahan pernyataan 112 Maurice juga mungkin menyebabkan pihak pembelaan tidak memanggilnya sebagai saksi jika pernyataannya tidak membantu mereka dan seterusnya menjimatkan banyak masa mahkamah. Tambahan pula, pernyataan tersebut tidak boleh dianggap sebagai dokumen terlindung seperti yang diputuskan dalam kes *Siti Aisyah* di mana mahkamah memutuskan bahawa keputusan yang diambil oleh Mahkamah Tinggi dalam kes *Husdi v Public Prosecutor* tidak lagi harus diikuti kerana badan perundangan telah melihat kewajaran untuk mengklasifikasikan dokumen-dokumen tertentu dalam Akta Keterangan 1950 ('AK') sebagai terlindung. Selanjutnya, s 32 AK memperuntukkan bahawa dalam kategori tertentu kes seperti apabila seseorang telah mati, tidak dapat ditemui, menjadi tidak berupaya memberikan keterangan atau kehadirannya tidak dapat diperoleh tanpa kelewatan atau perbelanjaan,

pernyataan kepada polis di bawah s 112 KTJ boleh diterima apabila perkaitannya dalam keadaan tertentu boleh ditunjukkan. Oleh itu, majistret yang bijaksana telah terkhilaf dalam menolak permohonan perayu (lihat perenggan 50, 53 & 97–100).

(4) Keputusan mahkamah di sini dibuat atas fakta yang sangat terbatas, terhad dan eksklusif yang khusus untuk kes ini seperti yang dinyatakan di atas. Keputusan ini tidak memutuskan bahawa sebagai peraturan am, pernyataan saksi daripada saksi yang ditawarkan kepada pihak pembelaan pada pengakhiran kes pendakwaan, mesti dibekalkan kepada pihak pembelaan. Hak pihak pembelaan untuk pendedahan pernyataan saksi secara automatik atau atas permintaan, di mana saksi sedemikian ditawarkan kepada pihak pembelaan pada pengakhiran kes pendakwaan, mesti menunggu campur tangan daripada badan perundangan (lihat perenggan 104–107).]

Cases referred to

Chris Christian & Ors v PP [2019] MLJU 1916, HC (refd)
Dallison v Caffery [1964] 2 All ER 610, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312; [2010] 4 CLJ 265, FC (distd)
Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya [2019] MLJU 282, FC (distd)
Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2022] 1 MLJ 137, CA (refd)
Husdi v PP [1979] 2 MLJ 304 (refd)
Husdi v PP [1980] 2 MLJ 80, FC (refd)
Martin Rhienus v Sher Singh [1949] 1 MLJ 201, CA (refd)
Methuram Dass v Jagannath Dass (1901) ILR 28 Cal 794, HC (refd)
Muthusamy v PP [1948] 1 MLJ 57 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436, SC (refd)
R v Brown (Winston) [1998] AC 367, HL (refd)
R v Bryant and Dickson (1946) 31 Cr App R 146 (refd)
R v Lawson (1989) 90 Cr App Rep 107, CA (refd)
R v Ward [1993] 2 All ER 577, CA (refd)
Siti Aisyah v PP [2019] 4 MLJ 46; [2019] 7 CLJ 27, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 s 3(1)
Criminal Procedure Code ss 5, 51, 51A, 112, 113, 113(1), (2), (3), (4), (5)
Evidence Act 1950 ss 32, 122, 123, 124, 126, 127, 128, 129, 145
Penal Code s 467

Alex Nandaseri De Silva (Quek Yiing Huey, Amrit Pal Singh, Angeline Tay Lee Yin and Ng Jun Wei with him) (Bodipalar Ponnudurai De Silva) for the appellant.
Izalina bt Abdullah (Nur Ashikin bt Mokhtar with her) (Deputy Public Prosecutor, Attorney's General Chambers) for the respondent.

Collin Sequerah J:

INTRODUCTION

[1] This is an appeal against the decision of the learned magistrate on 30 June 2020, which dismissed the appellant's application dated 28 May 2020 (Criminal Application No WA-89–486–05 of 2020) for the prosecution to provide a copy of a statement pursuant to s 112 of the Criminal Procedure Code ('the CPC') of a witness that was offered by the prosecution at the close of the prosecution's case, namely, Maurice De Alwis (NRIC No 490730–10–5301) ('Maurice's 112 statement').

BACKGROUND

[2] The appellant was charged on 29 August 2018 under s 467 of the Penal Code for forging a will belonging to one Adamberage Ananda Rex De Alwis (No K/P 480327–10–5695) ('the deceased').

[3] On 6 February 2020, the appellant was called to enter his defence on the charge. At the close of the prosecution case, the prosecution offered seven witnesses to the defence, one of whom is Maurice De Alwis (NRIC No 490730–10–5301) ('Maurice').

[4] Following the prosecution's offer of the seven witnesses to the appellant, the appellant's lawyers, through a letter dated 24 February 2020 ('letter dated 24 February 2020'), sought the prosecution's permission to interview Maurice for the purpose of determining whether to call Maurice as a defence witness.

[5] The prosecution allowed the appellant's lawyers request to interview Maurice and notified the same through a letter dated 2 March 2020 ('letter dated 2 March 2020').

[6] The interview with Maurice took place on 13 March 2020 and was attended by Maurice, the appellant's lawyers, and the investigating officer, ASP Tuan Johari bin Mohammad Ali ('IO').

[7] After receiving the letter dated 2 March 2020 from the prosecution, the appellant's lawyers requested the prosecution to provide a copy of Maurice's

112 statement by way of a letter dated 3 March 2020 ('letter dated 3 March 2020').

[8] The appellant's lawyers were informed orally by the prosecutors that their request had been rejected, no reasons having been given.

[9] The appellant's lawyers made another request to the prosecution for a production of Maurice's 112 statement by way of a letter dated 13 March 2020 ('letter dated 13 March 2020')

[10] However, the request was once again rejected by the prosecution through a letter dated 16 March 2020 ('letter dated 16 March 2020'). The prosecution relied on the case of *Husdi v Public Prosecutor* [1979] 2 MLJ 304 to refuse the production of Maurice's 112 statement on the basis that that it was 'privileged'.

[11] Aggrieved by the prosecution's refusal to produce Maurice's 112 statement, the appellant filed an application on 28 May 2020 via Criminal Application No WA-89–486–05 of 2020 to the magistrate's court, for the prosecution to provide a copy of Maurice's 112 statement to the appellant.

[12] The appellant's application was heard and dismissed by the magistrate on 30 June 2020. In doing so, the learned magistrate distinguished the Court of Appeal decision in *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46; [2019] 7 CLJ 27.

[13] On the same, day, the appellant filed the present appeal against the magistrate's decision to refuse the disclosure of Maurice's 112 statement.

THE APPELLANT'S SUBMISSIONS

[14] The appellant's premised their appeal on the following:

(a) the learned magistrate erred in law in distinguishing the Court of Appeal decision in *Siti Aisyah v Public Prosecutor*;

(b) the appellant has a right in law to be furnished with a copy of Maurice's 112 statement. The appellant's application for disclosure was made after he was ordered to enter his defence, and the application was in respect of a witness offered by the prosecution (Maurice);

(c) the prosecution has a common law duty to disclose and provide 'unused materials' to the appellant, which in this instance is Maurice's 112 statement;

(d) Maurice's 112 statement is not a 'privileged' document;

(e) it is therefore necessary and/or desirable for Maurice's 112 statement to be furnished to the appellant; and

(f) it will be highly prejudicial to the appellant should he be refused the disclosure of Maurice's 112 statement as he will be denied the right to a fair trial.

THE RESPONDENT'S SUBMISSION

[15] The substance of the submission by the respondent essentially is that the said statement is a privileged document relying upon *Husdi v Public Prosecutor* [1979] 2 MLJ 304 by the High Court, *Husdi v Public Prosecutor* [1980] 2 MLJ 80 by the Federal Court and also *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1.

[16] The respondent also submitted that there was a real danger of tampering with witnesses if the court were to allow the supply of the said statement. It was also submitted that the *Husdi v Public Prosecutor* decision by the Federal Court binds this court by virtue of the doctrine of stare decisis.

[17] It was finally submitted that the *Siti Aisyah v Public Prosecutor* decision ought not to be followed because it was decided per incuriam and for want of jurisdiction as it failed to comply with s 3(1) of the Courts of Judicature Act 1964. In other words, being in the nature of an interlocutory application made during the course of the trial, the decision was unappealable.

ANALYSIS AND DECISION

[18] The respondent in the course of arguments placed reliance upon the decision of the Federal Court in *Husdi v Public Prosecutor* [1980] 2 MLJ 80 ('Federal Court *Husdi*') and also the decision of the High Court in *Husdi v Public Prosecutor* [1979] 2 MLJ 304 ('High Court *Husdi*').

[19] The appellant's on the hand relied upon the decision of the Court of Appeal in *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46; [2019] 7 CLJ 27 ('Siti Aisyah').

[20] In the course of analysis, it is thus necessary for this court to embark upon an examination of the decisions in the *Husdi* decisions in both the High court and the Federal Court and the reasoning of the Court of Appeal in *Siti Aisyah*.

High Court Husdi

[21] In this case the accused had been charged with the offence of house

breaking by night. His counsel applied for copies of the cautioned statement made by the accused to the police and of the statements recorded by the police from witnesses in the course of investigation. The application was refused by the deputy public prosecutor and application was made to the High Court.

[22] When the matter came up for hearing, only the application for the statements made in the course of police investigations was pursued, as it had already been held on good authority that an accused person is entitled as of right to a copy of his cautioned statement.

[23] Syed Othman FCJ, sitting as a High Court judge, relied essentially on the Indian case of *Methuram Dass v Jagannath Dass* (1901) ILR 28 Cal 794 in holding that a statement made in the course of police investigation was absolutely privileged.

[24] The learned judge also said that the ruling that a police statement is a privileged document was also followed by the Court of Appeal here in *Martin Rhienus v Sher Singh* [1949] 1 MLJ 201.

[25] In concluding, the learned judge held that although these two cases involve actions for defamation, he was of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes and there can be no right to inspect.

[26] His Lordship went on to hold that as a matter of public policy, he was of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.

[27] Therefore, it can be surmised that the rationale for the decision was twofold, namely, that firstly, police statements are absolutely privileged and secondly, if it is supplied, there is a real danger of witness tampering.

Federal Court Husdi

[28] The following two questions of public interest were referred to the Federal Court arising from the High Court *Husdi*:

(a) Whether a person charged with a criminal offence or offences triable summarily before a subordinate court is entitled in law at any, and if so, at what stage after his arrest to obtain copies of statements of witnesses recorded by the police in the course of investigations under s 112 of the Criminal Procedure Code.

(b) Whether a person charged with a criminal offence or offences is entitled to obtain a copy of a statement made by him to a police officer under the provisions of s 112 of the Criminal Procedure Code.

[29] However, during the course of the arguments, the scope of the questions was narrowed down into considering whether in the case of a witness called by the prosecution and who is in the box being cross-examined, counsel is entitled to a copy of his police statement in order to impeach his credit under s 145 of the Evidence Act ('the EA').

[30] The Federal Court held as follows:

> We are of the opinion that when the defence wants to impeach the credit of a prosecution witness, it is entitled to a copy of his police statement; not, however, directly as in England, but, as under the old s 113(ii), ie after the court has seen it and 'thinks it expedient in the interest of justice' to order a copy to be supplied.

[31] In summary, the court held that where the defence wants to impeach the credit of a prosecution witness, the defence is entitled to a copy of that witness's police statement, not directly, but through the intervention of the court.

[32] The Federal Court then alluded to the impeachment procedure as outlined by Taylor J in *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57, where, inter alia, it was held that it is the court which reads the statement first in order to determine whether there is a serious discrepancy.

[33] If there is no serious discrepancy, the court so rules and that is the end of the matter. If the court rules that the discrepancy is material, then the procedure outlined in that case for impeachment follows.

[34] It is not necessary for the purposes of this judgment to discuss the impeachment procedure but it suffices to make the point that the police statement of the witness can be supplied to the defence if the court thinks it expedient in the interest of justice, in the event of an application to impeach the witness.

[35] What is significant for the purposes of the issue at hand is that at the end of the judgement in the Federal Court *Husdi*, Suffian LP made the following observation:

> Our conclusion is not inconsistent with judgment of Syed Othman FCJ in *Husdi v Public Prosecutor* [1979] 2 MLJ 304 out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

[36] It is clear, therefore, that the Federal Court was not called upon to consider the 'wider question' of whether the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses.

[37] This means that it was only the High Court decision in *Husdi* that dealt with the 'wider question' of whether the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, a question which was decided in the negative.

[38] The Federal Court in *Husdi* also did not embark upon a consideration as to whether such statements are privileged or otherwise. The *Husdi* High Court decision is of course not binding on this court being a court of coordinate jurisdiction.

[39] The issue in the instant case is of course much narrower in that the only issue to be considered is whether the statement of a witness offered to the defence by the prosecution at the close of the prosecution case can be handed to the defence for the purposes of deciding whether or not to call such offered witness during the course of the defence case. The matter before this court does not, therefore, deal with the question of whether the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses.

Siti Aisyah

[40] In this appeal, the Court of Appeal ('COA') was concerned with the point of whether the prosecution can be ordered, at the end of the for the prosecution, and where defence has been called, to furnish to the accused a copy of witness statements recorded under s 112 of the Criminal Procedure Code ('the CPC') of witnesses offered to the defence which are material and which may assist the defence case.

[41] The factual matrix is thus quite similar to the instant case.

[42] The brief background facts that led to the appeal being brought was that the High Court on a charge of murder called for the defence of the accused persons at the end of the prosecution case.

[43] The prosecution then offered certain witnesses to the defence. The defence then applied under s 51 of the CPC for an order to direct the prosecution to provide to the defence copies of statements of seven named witnesses recorded under s 112 of the CPC.

[44] The learned High Court judge, however, declined to make the order. In so doing the learned judge relied upon the decisions in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1, *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 CLJ 265, *Martin Rhienus v Sher Singh* [1949] 1 MLJ 201, *Husdi v Public Prosecutor* [1979] 2 MLJ 304 and *Husdi v Public Prosecutor* [1980] 2 MLJ 80, and was of the view that the

police statements were not subject to disclosure as they were absolutely privileged documents.

[45] After embarking on an analysis of the decisions in the two *Husdi* cases, the court agreed with the appellant that there was a duty on the prosecution to disclose to the defence the police statements of the witnesses offered to the defence which were necessary and desirable to their case. They also held that although there was no statutory obligation to do so, there was such a duty at common law.

[46] It is important at this juncture to make the point that from the judgment of the COA, it is quite plain that the learned High Court judge in *Siti Aisyah* based his decision to not order the police statements to be supplied because he was of the view that they were privileged in nature.

[47] In doing so, His Lordship relied primarily upon the High Court *Husdi* case. An examination of that case will reveal that the issue related to the supply of statements in advance of trial. The other issue of major concern was the real danger of witness tampering in that instance.

[48] The COA in *Siti Aisyah* thus distinguished the *Husdi* High Court case on the basis that in the case before them, the application was made after defence was called and the statements sought for were in respect of that given by witnesses offered to the defence.

[49] In that light, the COA held that there could be no issue of tampering with witnesses because it was hard to see how you could tamper with your own witness.

[50] In respect of the issue of privilege, the COA was of the view that the position taken in the High Court *Husdi* ought no longer to be followed. This is because the Legislature had seen fit to classify certain documents in the Evidence Act 1950 as privileged.

[51] Amongst these were affairs of state under s 123, official communications under s 124, communications during marriage (marital privilege) under s 122 and legal professional privilege under ss 126–129.

[52] If police witness statements were intended to be included in such classification, Parliament would have no doubt so classified it.

[53] The other reason the COA held that such statements cannot be privileged is because s 32 of the EA provides that in certain categories of cases,

for eg in the case of a person who is dead, cannot be found, becomes incapable of giving evidence or whose attendance cannot be procured without delay or expense, police statements under s 112 of the CPC are admissible where their relevancy in certain circumstances can be shown.

[54] The COA also made the poignant observation that s 112 of the CPC had undergone a metamorphosis since the time of the *Husdi* cases which represented a shift away from the rigid position that such statements cannot ever be disclosed.

[55] Throughout this discussion, it also must not be lost sight of the fact that all these applications have their basis in s 51 of the CPC which reads as follows:

> 51 Summons to produce document or other things
>
> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possess on or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

[56] The COA in *Siti Aisyah* with regard to s 51 held:

> The jurisprudence in relation to s 51 of the CPC is not controversial. *Apart from satisfying the dual requirements of necessity and desirability as provided under s 51 itself, the stage at which the application for disclosure is made is of primary importance. If the application is made before the commencement of the trial, the disclosure is limited to matters as stated in the charge.* Anything more would be tantamount to the defence having inspection of the evidence of the prosecution prior to trial. Pre-trial disclosure in criminal cases cannot be equated to the pre-trial discovery and inspection of documents in a civil proceeding. In exercising the discretion under s 51 of the CPC, the court must have regard to the justice of the case. (Emphasis added.)

[57] In so holding, the COA placed reliance upon the case of *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436, inter alia.

[58] So, at the end of the day, any application for the admission of statements of witnesses taken during the course of investigation must abide by the requirements stated in s 51 of the CPC and the jurisprudence following it as discerned from cases such as *Raymond Chia*.

[59] It is also significant to make the point that *Siti Aisyah* held that the Federal Court in *Husdi* was not called upon to decide the issue of whether the

defence was entitled in advance of trial to copies of the police statements of witnesses.

[60] Nor was the Federal Court in *Husdi* called upon to decide on whether the statements were privileged. This being the case, it is only the High Court in *Husdi* that held that police statements were privileged.

[61] The COA in *Siti Aisyah* in conclusion held that there was a duty on the prosecution to disclose to the defence the police statements of the witnesses offered to the defence which were necessary and desirable to their case and that although there was no statutory obligation to do so, there was indeed such a duty at common law.

[62] The COA in *Siti Aisyah* after having combed through the cases decided in England held:

> As it turns out, the law in respect of prosecutorial disclosure in England has developed significantly. *The Malaysian courts, however, have been stuck in time and have not traversed beyond R v Bryant and Dickson* (1946) 31 Cr App R 146 ('Bryant and Dickson') *where it was held that where the prosecution has taken a statement from a person who can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence, but they are not under a further duty of supplying the defence with a copy of the statement which they have taken*. (Emphasis added.)

[63] The COA also alluded to dicta of Lord Denning MR in *Dallison v Caffery* [1964] 2 All ER 610 ('Dallison') where it was observed (at p 618):

> *The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence.* It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor (for the prosecution), immediately after the court proceedings, gave the solicitor for the defence the statement of Mr and Mrs Stamp; and thereby he did his duty. (Emphasis added.)

[64] It is significant that this obligation on the prosecution to supply the statement of a witness to the defence was stated as long ago as 1964.

[65] This is no doubt what Harmindar Singh Dhaliwal JCA (as His Lordship was then) in *Siti Aisyah* had in mind when he said that the Malaysian courts have been stuck in time and have not traversed beyond *R v Bryant and Dickson* (1946) 31 Cr App R 146.

[66] His Lordship also examined the English decisions of *R v Lawson* (1989) 90 Cr App Rep 107, *R v Ward* [1993] 2 All ER 577, and the decision of the House of Lords in *R v Brown (Winston)* [1998] AC 367 all of which held in varying degrees that unless there are good reasons for not doing so, fairness requires that material in the possession of the prosecution which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed.

[67] An analysis of the English decisions will show an emphasis on justice and fairness in being pivotal considerations for disclosure. In fact, the COA in *Siti Aisyah* made the point that the enactment of s 51A of the CPC displayed a trend towards an 'equality of arms' principle in criminal cases notwithstanding the adversarial nature of trials inherited from our common law heritage.

[68] Two things are noticeably apparent, firstly, the English common law has long since departed from the inflexible rule that such statements are not to be supplied and secondly, there is a noticeable shift towards justice and fairness and the 'equality of arms' notion even within the adversarial nature of our system.

[69] As far as the English common law is concerned and its capability of importing it here by virtue of s 5 of the CPC, it is apparent from *Siti Aisyah* that there is no conflict or inconsistency with the CPC in the admission of police statements of witnesses because what s 113(1) prohibits is such statement being used in evidence and not in cases where such statement is only disclosed to the defence.

[70] To that extent, a lacuna exists in that there is no explicit provision in our statutes that cover the law in respect of disclosure of such documents which comprise the prosecution unused documents as opposed to such documents being sought for the purposes of introducing it in evidence, save where otherwise provided.

[71] As the COA observed, there is nothing in the law that allows nor prohibits the supply of such documents for the purposes of disclosure. Section 5 of the CPC reads:

> 5 Laws of England, when applicable.
>
> As regards matters of criminal procedure for which no special provision has been made by this Code or by other law for the time being in force relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

[72] In the premises, s 5 of the CPC can be resorted to in the applicability of English law on the subject matter at hand.

[73] Resort to English cases will also not be in conflict with or be inconsistent with s 51 of the CPC which explicitly provides for the admission of documents upon certain conditions being fulfilled and this will include the class of documents sought for here.

[74] Therefore, the decisions of the English courts cited and relied upon by the COA in *Siti Aisyah* are also relevant and applicable.

[75] By way of summary, an analysis of the COA decision in *Siti Aisyah* shows that the following propositions were enunciated:

(a) police statements under s 112 of the CPC cannot be privileged as there are documents enumerated in the Evidence Act 1950 ('the EA'), for eg affairs of state under s 123, official communications under s 124, communications during marriage (marital privilege) under s 122 and legal professional privilege under ss 126–129;

(b) police statements under s 112 of the CPC cannot be privileged because s 32 of the EA provides that in certain categories of cases, for eg in the case of a person who is dead, cannot be found, becomes incapable of giving evidence or whose attendance cannot be procured without delay or expense, police statements under s 112 of the CPC are admissible where their relevancy in certain circumstances can be shown;

(c) Syed Othman FCJ in the High Court *Husdi* was wrong in saying there was no lacuna in the law and declined to rely on s 5 of the CPC;

(d) s 5 of the CPC is twofold in that there must not be any statutory provision in the CPC or other law and also that the law in England must not be in conflict or inconsistent with the CPC;

(e) there is no conflict with s 113(1) of the CPC for police statements to be disclosed because s 113(1) prohibits it being used in evidence save for purposes of impeachment under s 113(2);

(f) the issue therefore is one of prosecutorial disclosure of unused material which may benefit the defence;

(g) the position with regard to disclosure of unused material can follow the common law in England by virtue of s 5 of the CPC because there is no inconsistency with the CPC for the reason given in (v) above; and

(h) the Federal Court in *Husdi* was not called upon to decide whether the defence was entitled in advance of trial to copies of the police statements of witnesses or whether the statements were privileged or not.

Amendment to s 113 of the CPC

[76] As was pointed out by the COA in *Siti Aisyah*, s 113 of the CPC was substituted with a completely new provision. By this amendment, the court can intervene and order production of s 112 of the CPC statements for the purposes of challenging and impeaching the credit of witnesses as provided in s 113(2) of the CPC.

[77] This was by virtue of two Amendment Acts (Act A1274) and (Act A1304) in 2007.

[78] A police statement under s 112 of the CPC can also be admitted in evidence in other situations as provided in sub-ss 113(3), (4) and (5).

[79] It was also on this basis that the COA observed that since statute allows such police statements to be admitted in evidence in certain circumstances, it would appear that police statements were never intended to be privileged documents.

[80] With regard to the contention of the respondent that the *Siti Aisyah* decision in the COA was decided per incuriam because it was a matter which was not appealable, I find that as the respondent's had not sought to impeach or appeal the decision on that ground, the decision stands unless and until it is set aside.

[81] The Federal Court decision in *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282 dealt with the issue of pre-trial production of, inter alia, witness statements and so is distinguishable on the facts.

[82] Similarly, the Federal Court decision in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 CLJ 265 also related to request for pre-trial documents which included witness statements.

[83] It is to be noted that there is a clear distinction between a request for documents made at the pre-trial stage and that made post-trial stage. In the case of the former, the documents sought for must only relate to the charges proffered. See *Raymond Chia*.

[84] With regard to the decision of the COA in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137, better known as the ('SRC') appeal, learned counsel for the applicant cited the following passage:

> [378] *Learned counsel for the appellant submits on the strength of this court's pronouncement in Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46; [2019] 7 CLJ 27

> *that the appellant has a right to the statements of all those offered witnesses that the defence wants to call. However, with respect, we are by the doctrine of stare decisis bound by the ratio decidendi in Husdi v Public Prosecutor* [1979] 2 MLJ 304*, where the Federal Court had held statements recorded by the police, and by extension any other investigating body such as the MACC, from potential witnesses in the course of investigations are privileged.* The Federal Court had as a matter of policy stated that such statements are privileged from disclosure. In this regard, we concur with the findings of the learned trial judge that he too is bound by the pronouncement of the Federal Court in *Husdi v Public Prosecutor* and that the statements of witnesses offered to the defence are privileged from disclosure for the reasons stated in the learned trial judge's grounds of judgment, which we find states the correct position in law. *Suffice to say that we find the reasons given by the learned trial judge for the dismissal of the appellant's application to be well grounded in law and is the correct position in law, in light of the Federal Court's pronouncement in Husdi v Public Prosecutor* and *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282; [2019] 1 LNS 434, which affirmed this court's judgment in *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2019] 4 MLJ 180; [2019] 5 CLJ 23. Thus, we do not find any reason for appellate intervention. (Emphasis added.)

[85] As pointed out by learned counsel for the applicant, what in fact the Court of Appeal was referring to above was the High Court *Husdi* and not the Federal Court *Husdi* which citation is [1980] 2 MLJ 80.

[86] Reverting to the instant appeal, the reason as to why the statement of Maurice is being sought for is that he is of an advanced age at 71 years old. His memory may, therefore, have faded with the onset of age.

[87] The deceased passed away in 2006. Accordingly, Maurice's 112 statement is vital for the preparation of Maurice's evidence and the appellant's case.

[88] Learned counsel for the appellant also submitted that Maurice was not only the executor of the deceased's will, he was also the defendant in the civil proceedings brought by the deceased's widow.

[89] Hence, Maurice's evidence is wholly relevant to the question of whether the appellant forged the deceased's signature in the will. Maurice's 112 statement would undoubtedly be crucial to the appellant's defence, the executor never having taken any legal action for the estate against the accused person.

[90] Because the application for Maurice's statement was made after the commencement of trial, the issue is whether the appellant has fulfilled the twin requirements stipulated in s 51 of the CPC that the police statement of

Maurice is both necessary and desirable.

[91] The facts of the case as described by counsel for the appellant, shows that the evidence of Maurice will certainly be highly relevant to a fact in issue ie bearing on the question as to whether the appellant forged the will or not.

[92] Maurice, in light of his advanced age, will also not likely be able to recollect most if not all of what he said in his police statement. For that reason, interviewing him might prove to be a futile and fruitless exercise.

[93] The disclosure of the statement of Maurice to the appellant will also no doubt assist the defence in the preparation of their case and prevent surprises and possible impeachment of Maurice.

[94] I find, therefore, that the appellant has fulfilled the twin requirements in s 51 of the CPC that the statements are both necessary and desirable.

[95] The prosecution should, therefore, disclose any unused material which may benefit the defence as English common law dictates and such common law is applicable here by virtue of s 5 of the CPC, there being a lacuna and no inconsistency with the CPC.

[96] In *Chris Christian & Ors v Public Prosecutor* [2019] MLJU 1916, my learned sister Rozana Ali Yusoff J, in a similar application held:

> [20] If the prosecution has closed its case and the witnesses of whom the statements were sought were offered to the defence, by virtue of ss 5, 51 of the CPC, English common law and Siti Aisyah, the prosecution has a duty at common law not statutory obligation, to provide the 112 statement to the defence where the court thinks it expedient in the interest of justice, necessary and desirable for the defence to defend the case.

[97] The real danger of Maurice being impeached were his statement not to be disclosed is also a relevant factor to be considered. The real risk of witness tampering which had played a major influence in both the *Husdi* cases, does not arise here for the simple reason that Maurice would, if at all he is called, be a defence witness.

[98] The disclosure of the statement of Maurice may also well result in the defence taking the position that they may not call him if his statement will not assist them in any way and so result in saving of much judicial time.

[99] The statements of Maurice cannot be also considered to be privileged

documents based on the reasons set out above in *Siti Aisyah* to which I fully subscribe to.

[100] The learned magistrate had, therefore, erred in refusing the appellants application.

[101] Based upon the reasons expressed above I, therefore, allow the application for the disclosure of the statement of Maurice by the prosecution.

[102] In the event it becomes necessary, the statement can also be used for the purposes of impeachment as stated in s 113(2) of the CPC.

[103] Similar to the position in *Siti Aisyah*'s case, I also do not see any reason to justify non-disclosure on grounds of public interest.

[104] I wish to state in no uncertain terms and emphasise, however, that the decision of this court is made on very restricted, limited and confined facts peculiar to this case, namely, the advanced age of Maurice which may affect his recollection of events, the futility of interviewing him in light of his advanced age, the fact that his evidence for the defence might well influence the outcome of the charge against the appellant ie it is highly relevant to the issue of whether the appellant had forged the will of the deceased and thus had fulfilled the twin requirements in s 51 of being both desirable and necessary.

[105] It is a decision, therefore, that is confined to its own facts.

[106] In order to clarify further, this decision does not decide that as a general rule, witness statements of witnesses offered to the defence at the close of the prosecution case, must be supplied to the defence.

[107] The right of the defence to automatic disclosure of witness statements or upon request, where such witnesses are offered to the defence at the close of prosecution case, must await legislative intervention.

[108] On those very narrow and limited grounds, this appeal is allowed.

Appeal allowed.

Reported by Dzulqarnain Ab Fatar